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MICHAEL RODAK, JR., CLERK

**In the
Supreme Court of the United States**

OCTOBER TERM 1977

~~No. 7~~ - 997

STATE OF HAWAII,
Petitioner,

vs.

CONSUMER PRODUCT SAFETY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of
the Supreme Court of the United States:

Your Petitioner, State of Hawaii, respectfully prays that a
Writ of Certiorari be issued to review the decision of the
United States Court of Appeals for the District of Columbia
Circuit in the above case.

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REPORTS OF THE AGENCIES AND COURTS BELOW

Presiding Officer's Report to Consumer Product Safety Commission (hereinafter "CPSC"), dated April 8, 1975, recommending against banning Class C firecrackers (the summary page of which is attached herewith as Appendix A).

CPSC's Rulings on Exceptions, Findings of Fact, Conclusions of Law, and Tentative Order, with two Commissioners dissenting, dated March 4, 1976, 41 F.R. 9512-9526 (relevant portions of which are attached herewith as Appendix B).

Judgment of the United States Court of Appeals for the District of Columbia Circuit, entered October 5, 1977, with Chief Judge Howard T. Markey dissenting (Appendix C). Not reported.

Order of the United States Court of Appeals for the District of Columbia Circuit, entered November 18, 1977, with Chief Judge Markey dissenting (Appendix D). Not reported.

JURISDICTION

The Court of Appeals Judgment was entered October 5, 1977, and the Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Judgment of the United States Court of Appeals for the District of Columbia Circuit (Appendix C), that the CPSC's Confirming Order and Supplementary Findings (42 F.R. 34873 *et seq.*) were "supported by substantial evidence", was clearly erroneous?

2. Whether the CPSC may assume, in the Absence of Any Evidence in Support Thereof, that Firecrackers with less than 50 Mg. of Pyrotechnic Material are Sufficient to Satisfy Chinese Religious Needs?

3. Whether the CPSC may Justify its Decision-Making Upon the Lack of Evidence in the Record, Rather than Upon Substantial Evidence?

4. Whether the CPSC may unilaterally, without notice, place the burden of proof upon the State of Hawaii (a non-proponent of a rule or order) to introduce quantitative evidence regarding the amount of pyrotechnic material required by the Chinese religion?

STATUTES AND RULE INVOLVED

Food, Drug and Cosmetic Act, 21 U.S.C. § 371(e)(3):

"Such order [of the CPSC] shall be based only on substantial evidence of record at such hearing and shall set forth, as part of the order, detailed findings of fact on which the order is based."

Food, Drug and Cosmetic Act, 21 U.S.C. § 371(f)(3):

"Upon the filing of the petition referred to in paragraph (1) of this subsection, the court shall have jurisdiction to affirm the order, or to set it aside in whole or in part, temporarily or permanently. If the order of the Secretary refuses to issue, amend, or repeal a regulation and such order is not in accordance with law the court shall by its judgment order the Secretary to take action, with respect to such regulation, in accordance with law. The findings of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive."

Administrative Procedure Act, 5 U.S.C. § 556(d):

"[T]he proponent of a rule or order has the burden of proof"

Federal Hazardous Substances Act, 15 U.S.C. § 1261(f)(1)(A):

"(f) The term 'hazardous substance' means:

(1)(A) Any substance or mixture of substances which (i) is toxic, (ii) is corrosive, (iii) is an irritant, (iv) is a strong sensitizer, (v) is flammable or combustible, or (vi) generates pressure through decomposition, heat, or other means, if such substance or mixture of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion by children."

Federal Hazardous Substances Act, 15 U.S.C. § 1261(q)(1)(B):

"(q)(1) The term 'banned hazardous substance' means . . . (B) any hazardous substance intended, or packaged in a form suitable, for use in the household, which the Secretary by regulation classifies as a 'banned hazardous substance' on the basis of a finding that, notwithstanding such cautionary labeling as is or may be required under this chapter for that substance, the degree or nature of the hazard involved in the presence or use of such substance in households is such that the objective of the protection of the public health and safety can be adequately served only by keeping such substance, when so intended or packaged, out of the channels of interstate commerce"

21 C.F.R. 2.63(a):

"At any hearing held as provided in section 701 of the act, the originator of the proposal or petition for the issuance, amendment, or repeal of any regulation contemplated under section 701(e)(1) of the act, shall be, within the meaning of

section 7(c) of the Administrative Procedure Act (5 U.S.C. 1006(c)), the proponent of the rule or order, and accordingly shall have the burden of proof."

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, First Amendment:

"Congress shall make no law respecting an establishment of religion"

STATEMENT OF THE CASE

A. Introduction

This Petition contests the propriety of a CPSC decision, which sharply curtailed what it admittedly termed a "sincere and necessary" religious use of firecrackers,¹ without the benefit of any evidence in the record.

The CPSC banned firecrackers containing a pyrotechnic charge of more than 50 milligrams, but less than 130 milligrams, upon the *assumption* that a charge of less than 50 milligrams was sufficient to satisfy Chinese religious use. Indeed, in its brief below, it assumed that since the State of Hawaii had failed to introduce any quantitative evidence regarding the amount of pyrotechnic composition required, it could ban all but 50 milligram ("ladyfinger") firecrackers.²

This subtle shift in the burden of proof is an egregious violation of the substantial evidence rule. The CPSC's decision also displays a cavalier disregard for important Chinese religi-

¹Appendix B, 41 F.R., at 9518.

²"Because of a lack of any showing that 50 mg. firecrackers would not satisfy the religious use claimed, the Commission did not determine whether use of firecrackers brings into play the First Amendment." CPSC Brief, below, at 25.

ous rights and makes a mockery of the First Amendment Freedom of Religion.

If the CPSC may curtail religious rights because of the substantial *lack* of evidence (rather than upon affirmative evidence), then there is no minute bastion of religious rights which is invulnerable to governmental intrusion.

B. Statement of the Facts

On May 16, 1974, the CPSC published proposed regulations to ban all firecrackers as hazardous substances.³

Lengthy nationwide hearings were held, during which the State of Hawaii introduced evidence to establish the necessity for a religious and cultural exemption from the proposed firecracker *ban*. No quantitative evidence of pyrotechnic composition was requested or introduced.

After the hearings, Administrative Law Judge Paul N. Pfeiffer found, *inter alia*, as fact that there exists a sincere and necessary Chinese religious use of firecrackers and recommended that the "protection of the public health and safety does not require the banning of Class C⁴ firecrackers as hazardous substances."⁵

However, on June 2, 1976, the CPSC, with two Commissioners dissenting, overruled all of Judge Pfeiffer's findings with virtually no explanation, holding, *inter alia*, that:

"17. Use of firecrackers by the Chinese-American community for religious purposes is necessary.

"18. A reasonable and workable exemption from a ban on firecrackers for religious purposes cannot be established.

³39 F.R. 17435, *et seq.*

⁴Class C firecrackers are those containing no more than 2.0 grains (130 mg.) of pyrotechnic composition.

⁵Appendix A, at 2.

"19. The existence of an exemption to a ban on firecrackers for religious purposes would create serious enforcement problems for the Commission.

"20. Religious or cultural use of firecrackers do not require any specific power content.

"21. Firecrackers containing 50 milligrams (.772 grains) of pyrotechnic composition will satisfy religious and cultural needs."⁶

No evidence or explanation for Finding No. 21's 50-milligram cut-off can be gleaned from the record or any of the CPSC's orders.

Indeed, two Commissioners dissented from the CPSC's decision, stating, with respect to the 50-milligram cut-off, that there was no evidence in the record "that would permit me to differentiate among various sizes of firecrackers"⁷ and that the evidence shows that "the smaller firecrackers or 'ladyfingers' will not satisfy the Chinese-American religious needs."⁸

On June 2, 1976, the CPSC issued its Final Order⁹ from which various parties, including the State of Hawaii, petitioned the United States Court of Appeals for the District of Columbia Circuit (hereinafter "Circuit Court"), for review.¹⁰

⁶Appendix B, 41 F.R., at 9523.

⁷Commissioner R. David Pittle, Joint Appendix, below, at 115, Certified Document Number 201.

⁸Commissioner Barbara H. Franklin, Joint Appendix, below, at 108 and 110, Certified Document Number 202.

⁹41 F.R. 22931, *et seq.*

¹⁰The Circuit Court remanded the case to the CPSC at one point to clear up a voting impropriety before ruling on the merits of the case. *See* Appendix C and 42 F.R. 34873-34874.

The State of Hawaii argued that there was no quantitative evidence in the record to support the CPSC's 50-milligram cut-off, that the figure was manufactured out of thin air, and that therefore the CPSC's decision was not supported by evidence—substantial or insubstantial.

However, on October 5, 1977, a three-judge panel of the Circuit Court, with Chief Judge Howard T. Markey¹¹ dissenting, granted judgment for the CPSC for the sole reason that its Confirming Order "is based on findings supported by substantial evidence."¹² No other written findings were rendered and no opinion was published.

The State of Hawaii thereupon filed a Motion for Reconsideration and Petition for Rehearing upon the grounds that:

1. There was no evidence in the record to support the Consumer Product Safety Commission's determination that up to 50 milligrams of pyrotechnic material is sufficient to satisfy Chinese religious needs; and

2. The CPSC and the Petitioner below failed to sustain their burdens to prove that 50 milligrams of pyrotechnic material would satisfy the Chinese religion. The said Motion and Petition were summarily denied, with Chief Judge Markey again dissenting, on November 18, 1977.¹³

It is from this record that the State of Hawaii petitions this Court for review.

¹¹Chief Judge of the United States Court of Customs and Patent Appeals, sitting by designation. *See* Appendices C and D.

¹²Appendix C.

¹³Appendix D.

ARGUMENT

I

THERE WAS NO EVIDENCE IN THE RECORD TO SUPPORT THE CONSUMER PRODUCT SAFETY COMMISSION'S DETERMINATION THAT UP TO 50 MG. OF PYROTECHNIC MATERIAL IS SUFFICIENT TO SATISFY CHINESE RELIGIOUS NEEDS

There is absolutely no evidence in the record to suggest that firecrackers containing less than 50 mg. of pyrotechnic composition will satisfy the Chinese religious requirements. Therefore, at the very least the case must be remanded to the CPSC for further proceedings with respect to the quantitative pyrotechnic requirements of the Chinese religion.

The CPSC determined that "the use of firecrackers for religious purposes is deeply rooted in tradition" and that their "religious use is sincere and necessary."¹⁴

Although no evidence regarding the quantity of pyrotechnic composition required by the Chinese religion was requested or introduced, the CPSC nevertheless ruled that 50 mg. would "satisfy religious and cultural needs."¹⁵ For that reason, the CPSC "believes it is unnecessary to decide whether a ban would run afoul of Constitutional requirements."¹⁶ It supports this *ipse dixit* conclusion by its assumption that since there is no evidence that the smaller firecrackers will not satisfy the Chinese religion, the larger ones may therefore be banned:

¹⁴Appendix B, 41 F.R., at 9518.

¹⁵*Id.*, 41 F.R., at 9523.

¹⁶*Id.*, 41 F.R., at 9518.

"The record does not indicate that the smaller firecrackers will not satisfy the religious needs of the Chinese-American community. . . . [W]hile it is recognized that historically the 1½" common firecracker has been utilized for religious ceremonies, there was no showing that this particular firecracker is necessary."¹⁷

The thrust of the CPSC's decision is that since there is a substantial *lack* of evidence that more than 50 mg. is required by the Chinese religion, any firecrackers greater than 50 mg. may be banned.

The fact of the matter is that no evidence was adduced below with respect to whether the Chinese religion required a quantitative impact or whether 50 mg. was a satisfactory quantitative cut-off for religious use. The State of Hawaii merely introduced evidence to show a need for firecrackers, in response to the CPSC's intended ban of all firecrackers.¹⁸

The CPSC is required to adduce substantial evidence in support of its decision, particularly one which admittedly interferes so severely with the First Amendment rights of the Chinese religion. In this case, there was absolutely no evidence below that 50 mg. of pyrotechnic material is sufficient for the Chinese religious needs. Thus, there is no justified compelling governmental interest to support the ban.

The CPSC therefore erred in curtailing the Chinese religious use of firecrackers without the benefit of any evidence in support thereof.

The Circuit Court's decision was also manifestly erroneous in concluding that there was substantial evidence in support of the CPSC's decision.

¹⁷*Id.*, 41 F.R., at 9519.

¹⁸See 39 F.R. 17435, *et seq.*

II

THE CPSC IMPERMISSIBLY PLACED THE BURDEN OF PROOF UPON THE STATE OF HAWAII TO PROVE THAT MORE THAN 50 MG. OF PYROTECHNIC MATERIAL IS REQUIRED BY THE CHINESE RELIGION

It is well-settled that the proponent of a rule or order has the burden of proof before an administrative agency. Thus, the burden below was upon the CPSC and the National Society for the Prevention of Blindness to prove that 50 mg. of pyrotechnic material would satisfy the Chinese religion.

However, the CPSC, as we have seen, assumed that since "there was no showing that this particular [1½" common] firecracker is necessary"¹⁹ to the Chinese religion, it could ban all but 50 mg. firecrackers.

The CPSC therefore impermissibly and without notice shifted the burden of proof from the proponent of the ban (the CPSC and the National Society for the Prevention of Blindness, Inc.) to the opponent (the State of Hawaii). Indeed, it specifically found that "the burden of proof requirement under 21 C.F.R. 2.63 has not been met"²⁰ by the State of Hawaii.

The burden falls on the proponents and thus the lack of evidence to support the CPSC's decision requires a reversal of both the CPSC's and the Circuit Court's decisions.

¹⁹*Id.*, 41 F.R., at 9519.

²⁰*Id.*, 41 F.R., at 9519.

III

UNIQUE AND SUBSTANTIAL FIRST AMENDMENT RELIGIOUS RIGHTS ARE AT STAKE

Despite the CPSC's admission that "the use of firecrackers for religious purposes is deeply rooted in tradition" and their "religious use is sincere and necessary",²¹ it has nevertheless prohibited the use of firecrackers larger than "ladyfingers" in Chinese religious ceremonies and rituals.

This Court has, however, given religious freedom a preferred status and justified governmental interference thereof only upon a compelling State interest.

Yet, the CPSC has ordered, and the Circuit Court has affirmed, the curtailment of necessary religious practices upon the mere assumption that "ladyfingers" will wholly satisfy the Chinese religion.

We hasten to point out that two CPSC Commissioners dissented from this position, as did Chief Judge Markey from the Circuit Court's Judgment. Indeed, since Chief Judge Markey would have granted the State of Hawaii's Motion for Reconsideration and Petition for Rehearing, we can only assume that he wholly agreed with our position.

Compounding the injustice to those who practice the Chinese religion was the failure of the Circuit Court to articulate its rationale for ruling in favor of the CPSC.

This is clearly a situation in which unconscionable error has been perpetrated upon the Chinese of Hawaii, whose ancestors utilized firecrackers for centuries before their arrival to the United States. It is also a situation in which the CPSC has curtailed religious rights without the benefit of any evidence to support its unilateral action. It is finally a situation which commands relief from the only Court available to remedy a most unfair miscarriage of justice.

²¹*Id.*, 41 F.R., at 9518.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MICHAEL A. LILLY, ESQ.

Deputy Attorney General

State of Hawaii

Attorney for State of Hawaii

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Petition for Writ of Certiorari were mailed on the 30th day of December, 1977, to the parties of record at their respective addresses as follows:

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Appendix A

April 8, 1975

Ms. Sadye E. Dunn
Secretary
Consumer Product Safety Commission
1750 K Street, N.W.
Washington, D.C. 20207

Re: Presiding Officer's Report in the Hearing on Objections to
the Proposed Class C Fireworks Regulation, Docket No.
CPSC-74-3

Dear Ms. Dunn:

There is hereby transmitted for reproduction and publication the signed original of the Presiding Officer's Report in the Hearing on Objections to the Proposed Class C Fireworks Regulation, Docket No. CPSC-74-3. Although not required by the governing Food and Drug Administration Rules of Practice, in view of the Commission's openness policy, the intensity of the participation of the various parties to the proceeding, and also the request of Staff Counsel to file exceptions, it is recommended that the report be published and served upon all parties appearing on the service list. In addition, copies should be made available to all members of the public requesting same, on a minimal fee basis, if deemed necessary.

In addition, there is hereby certified to the Commission the record of the proceeding consisting of the following documents:

The regulation published May 16, 1974, the objections thereto; the July 8, 1974 stay of effective date of the regulation; the notices of hearing and prehearing conference published August 1, 1974; the transcript of the prehearing conference held September 10, 1974, pp. 1-96; the prehearing order of September 23, 1974 setting forth the

issues to be heard; the transcript of the Washington hearing held October 1-8, 1974, pp. W 1-1,084; of the Kansas City hearing held October 21-3, 1974, pp. KC 1-750 and the Honolulu hearing held October 29 through November 1, 1974, pp. H 1-694 and the reopened hearing held February 21, 1975, Tr. R-1-235 and the following exhibits:

The Fire Marshals Association of North America,
FMNA 1

The American Pyrotechnics Association, APA 1-11
Staff Counsel, SC 1-53 including SC 51A and SC-A statement of position

District of Columbia Fire Department, DCFD 1-2

Oklahoma Pyrotechnics Association, OPA 1-10

National Society for the Prevention of Blindness, NSPB
1-5

Blogin Sales Company, BSC 1-8

Mike's Fireworks and Toys, Inc., MFT 1-12

Stonebraker-Rocky Mountain Fireworks, SRF 1

Consigned Sales Company, Inc., CSC A and attachments
1-6

Health Research Group—HRG 1-2, and 4

State of Hawaii—H 1-21 including H 8A

One of the exhibits (SC 48) consists of a film taken of fireworks exploding in Honolulu on New Year's Eve which is available for viewing by the Commission. In addition, a sample of the Microcord M-50 fuse and a B-47 Jumbo Carnival Cone Fountain containing the recommended improved plastic base is forwarded for the Commission inspection. Additional samples can be obtained from the Phoenix Fuse, Ltd., P. O. Box 007, Stanton, Missouri 63079 and New Jersey Fireworks, Elkton, Maryland.

Official notice was taken of the copy of an advisory opinion of the General Counsel dated October 10, 1974 and various state, county and city fireworks control ordinances. American Academy of Pediatrics Exhibit AAP 1 was excluded but accompanies the record as an offer of proof.

Notices to All Parties issued September 23, 1974, November 29, 1974, January 3, 1975, January 30, 1975, February 10, 1975 and February 14, 1975.

In addition, there are numerous letters received on an *ex parte* basis which are included in the correspondence section of the docket. As a technical matter these are not part of the record since they were not received under oath and subjected to cross-examination, rebuttal and briefing. However, they may be referred to by the Commission although they are not entitled to the same weight as testimony or exhibits.

Finally, there are numerous briefs, reply briefs and supplemental briefs filed by the parties.

Very truly yours,

PAUL N. PFEIFFER
Administrative Law Judge
Enclosures

Appendix B

41 F.R. 9512 *et seq.*

CONSUMER PRODUCT SAFETY COMMISSION

[16 CFR Parts 1500, 1507]

FIREWORKS DEVICES

Rulings on Exceptions, Findings of Fact,
Conclusions of Law, and Tentative Order

In the matter of Fireworks Devices, the Consumer Product Safety Commission, pursuant to section 2(q)(1)(B) of the Federal Hazardous Substances Act (15 U.S.C. 1261(q)(1)(B)) and 21 CFR 2.97, issues the following rulings on exceptions, findings of fact, conclusions of law and tentative order: [41 F.R. at 9512]

* * *

The challenge raised by the State of Hawaii to protect the religious use of firecrackers by the Chinese-American community is particularly significant and convincing. Staff counsel, HRG, NSPB and APHA supported Hawaii on this question as did the APA. The record discloses that firecrackers are an important part of religious ceremonies, including the Chinese New Year, the Ching Ming festival, weddings, birthdays, baby parties, funerals, and various other occasions. The record further demonstrates that use of firecrackers for religious purposes is deeply rooted in tradition with a long standing, centuries old history. The Commission is convinced from the record that the religious use is sincere and necessary.

In addition to the religious use, Hawaii takes the position that it would be illegal to restrict the cultural use of firecrackers. The record demonstrates that in Hawaii firecrackers

are used extensively by many citizens, including those of occidental ancestry, for events and celebrations which include the Fourth of July and the Gregorian calendar New Year's Eve. The record further demonstrates that firecrackers are also utilized in many other parts of the country both where legal and illegal for patriotic expression and for recreational purposes. Outside of Hawaii and localities with large Chinese-American populations, the use of firecrackers is generally concentrated during the period around the Fourth of July.

Staff counsel and HRG have supported a narrow exemption to the ban which would allow firecrackers to be distributed for religious uses. The suggested procedure is through a permit and distribution system at the state and/or local level. The existence of an exemption and a permit procedure raises serious problems. First, a permit and distribution system, while perhaps possible and workable in places like Hawaii and California where there are large concentrations of Chinese-Americans, does not solve the problem in jurisdictions where only a small number of such persons live. The Commission has no authority to require state or local governments to set up or operate such a system and therefore has no guarantee that a system will be established for such persons. The possibility of a federal permit and distribution system has been considered, but it is believed that establishment and administration would be extremely difficult.

Without a permit and closely regulated distribution system, the allowance of an exemption could lead to serious abuse and could create serious enforcement problems. In this regard the record indicates that prior to the existing agricultural exemption, [Footnote omitted] an exemption for certain Class B items permitted for agricultural purposes did not include a permit or distribution system. It was found that because distribution was through commercial sources, many of the devices were sold to the general public. Also, the FDA had problems enforcing the regulation because of difficulty in proving that the devices were intended for household use [Footnote

omitted]. The current agricultural exemption, which includes both a permit and a distribution system, has to a great extent remedied the problem [Footnote omitted]. Apart from the agricultural exemption the record further indicates that a permit system without an accompanying distribution system leads to abuse. In San Francisco and Hawaii, where permit systems exist for Class C firecrackers, distribution to the general public has been widespread.

Finally, the most difficult and perhaps insurmountable problem is determining what in fact is a *bona fide* religious use. In this regard the record developed in Hawaii indicates that firecrackers are utilized by Chinese-Americans for various purposes which from a western point of view may not be considered religious but from an eastern vantage point clearly have religious significance and overtones. It appears difficult, if not impossible, to ascertain which practices are to be considered religious. For example, from a western point of view the use of firecrackers at wedding ceremonies and funerals might appear to have religious significance, while a Chinese-American businessman exploding firecrackers when opening a new shop would not. These same practices from an eastern viewpoint are indistinguishable. Similarly, the use of firecrackers by occidentals on New Year's Eve and the Fourth of July would normally be viewed as a non-religious use. The use by Chinese-Americans at the same events may carry religious significance. Indeed, the use of firecrackers by the Chinese-Americans at these events does not appear distinguishable from many other uses such as weddings or other celebrations. The record clearly demonstrates that western concepts of religion simply cannot be applied to eastern practices with respect to the use of firecrackers. The use of firecrackers by Chinese-Americans appears to be a fusion of religion, tradition, beliefs and practices loosely classified as "cultural."

The magnitude of the enforcement problems engendered by a religious exemption can not be overstated. First, someone would have to make a determination that an intended use is in

fact a religious use. As noted above this is difficult, if not impossible. The result undoubtedly would mean widespread and perhaps indiscriminate distribution. Moreover any enforcement action by the Commission would require proof that the firecrackers were intended for a non-religious use. If a religious exemption were to exist the anomolous and very unpopular result could occur where one ethnic group would be allowed to utilize firecrackers to celebrate an occasion such as New Year's Eve or the Fourth of July, while the rest of the population would be prohibited from the same practice. While it is recognized that as a practical matter these problems might be confined to Hawaii, there is no assurance that the same problems would not extend to the mainland, particularly in jurisdictions with a large population of Chinese-Americans. [41 F.R. at 9518]

* * *

Allowance of the less powerful firecrackers, while providing greater safety to the general public, also appears to satisfy the religious needs of the Chinese-American population as well as the desire of many citizens to utilize firecrackers for cultural, patriotic and other purposes. In light of its decision not to ban the distribution of all firecrackers, the Commission believes it is unnecessary to decide whether a ban would run afoul of Constitutional requirements [Footnote omitted]. The decision herein to limit the maximum explosive powder content does not appear to raise any Constitutional problems. The record does not indicate that the smaller firecrackers will not satisfy the religious needs of the Chinese-American community. While the testimony indicates that the sight, the sound, the smoke, the shattering transformation, the impact and movement, the color of the paper and the number of firecrackers detonated may have some significance, a specific decibel level, blast force or pyrotechnic composition is not required. Further, while it is recognized that historically the 1½" common firecracker has been utilized for religious ceremonies, there was no showing that this particular firecracker is neces-

sary. Indeed the record indicates that many sizes of firecrackers are utilized in religious ceremonies including the $\frac{7}{8}$ " ladyfinger.³⁵

The difficult and perhaps unworkable problem of establishing an exemption with its potential for serious abuse and enforcement problems is obviated by allowance of smaller firecrackers. . . .

* * *

I. FINDINGS OF FACT [Footnote omitted]

1. Adequate notice was not given to alert the public that the scope of this proceeding would be enlarged to consider a proposed ban on all fireworks devices or more stringent regulation for fireworks devices.

2. Adequate notice was not given to alert the public that the scope of this proceeding would be enlarged to consider a proposed ban on colored sparklers and hand held roman candles or additional specific performance requirements for fireworks devices with handles and spikes.

3. Firecrackers and other fireworks devices are flammable or combustible and/or generate pressure through decomposition, heat or other means.

4. Firecrackers and other fireworks devices may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use.

5. Information and statistics obtained from the NEISS system are sufficiently accurate and reliable to demonstrate the existence and the causes of injuries resulting from the use of firecrackers and fireworks devices.

³⁵ In this regard the burden of proof required under 21 CFR 2.63 has not been met. [41 F.R. at 9519.]

6. Information and statistics obtained from sources other than the NEISS system confirms the information obtained through the NEISS system relating to the existence and the causes of injuries resulting from the use of firecrackers and fireworks devices.

7. Firecrackers commonly produced for use in this country include the "common firecracker" which is approximately $1\frac{1}{2}$ " in length containing approximately 2.0 grains (130 milligrams) of pyrotechnic composition and the "ladyfinger" which is approximately $\frac{7}{8}$ " in length and containing approximately 50 milligrams (.772 grains) of pyrotechnic composition.

8. Class C firecrackers cause a substantial number of serious injuries.

9. There is a correlation between the nature and degree of injury caused by firecrackers and the amount of explosive powder contained in a given device.

10. Firecrackers of approximately $1\frac{1}{2}$ " in length containing approximately 2.0 grains (130 milligrams) of pyrotechnic composition cause more injuries than smaller Class C firecrackers.

11. Only a small number of injuries caused by small firecrackers such as ladyfingers containing 50 milligrams (.772 grains) or less pyrotechnic composition have been reported.

12. The nature and degree of the hazards posed by firecrackers containing pyrotechnic composition in excess of 50 milligrams (.772 grains) cannot be remedied through cautionary labeling.

13. A predominate number of injuries from Class C firecrackers are caused by misuse.

14. A ban on all firecrackers will result in an increase in bootlegging or clandestine sales of firecrackers including larger more dangerous Class B firecrackers.

15. A ban on all firecrackers will increase the incidence of homemade bombs which are in many cases more dangerous

than production firecrackers.

16. The allowance of some form of firecracker will to some degree reduce the extent of bootlegging and homemade devices.

17. Use of firecrackers by the Chinese-American community for religious purposes is necessary.

18. A reasonable and workable exemption from a ban on firecrackers for religious purposes cannot be established.

19. The existence of an exemption to a ban on firecrackers for religious purposes would create serious enforcement problems for the Commission.

20. Religious or cultural uses of firecrackers do not require any specific powder content.

21. Firecrackers containing 50 milligrams (.772 grains) of pyrotechnic composition will satisfy religious and cultural needs.

22. Blackpowder firecrackers have not been shown to be safer than flashpowder firecrackers.

23. No showing has been made that the requirements of section 1507 can be satisfactorily applied to firecrackers containing 50 milligrams (.772 grains) or less pyrotechnic composition.

24. A large number of injuries caused by fireworks devices other than firecrackers are caused by malfunction.

25. The language of § 1507.3 relating to fuses is sufficiently precise for regulatory purposes.

26. The fireworks industry is sufficiently able to comply with the requirements of § 1507.3 relating to fuses.

27. No need for precise test methods, deviation tolerances or deviation acceptance levels with respect to the requirements of § 1507.3 have been shown to be necessary.

28. Insufficient evidence exists to include in the regulation a requirement for a fuse with a visible burning point.

29. Insufficient evidence exists to include in the regulation a requirement for color coding of fuses.

30. Insufficient evidence exists to include in the regulation a requirement for adhesives utilized in conjunction with fuses.

31. A clarifying amendment to the base requirements of § 1507.4 including the base or cap for measurement of the height is necessary.

32. Insufficient evidence exists to include in the regulation a requirement that bases for fireworks have a square plastic ridge enclosing a solid circular area seated directly under the cylindrical firework.

33. Insufficient evidence exists to exempt from the base requirement of § 1507.4 fireworks devices with bases containing 6 grams or less pyrotechnic composition.

34. An amendment to the requirement of § 1507.9(b) for toy smoke and flitter devices to provide that such devices shall not be of such color *and* configuration so as to be confused with banned fireworks is reasonable and will not create any significant safety hazard.

35. Insufficient evidence exists to amend the requirement contained in § 1507.7 for handles and spikes.

36. The terms "burnout" and "blowout" contained in § 1507.6 of the regulation are widely understood and used in the industry and are sufficiently precise for regulatory language.

37. No showing has been made that the industry is unable to comply with the "burnout" and "blowout" requirements of § 1507.6.

38. An amendment to the labeling requirements of § 1500.14 allowing the optional use of the word *close* from the phrase "Use only under close adult supervision" is reasonable and will

not create any significant safety hazard.

39. Insufficient evidence exists to amend the labeling requirements of § 1500.14 in any respect other than the optional allowance the word *close* from the phrase "Use only under close adult supervision."

40. No significant adverse environmental consequences will result from the regulation.

41. Many manufacturers were, at the time of the hearings herein, producing fireworks in compliance with provisions of the proposed regulation.

42. Provision for an effective date 180 days from the date of publication of the final order is necessary and reasonable.

43. Insufficient evidence was presented to extend the effective date of the regulation beyond 180 days after the final order is issued.

J. CONCLUSIONS OF LAW

1. Firecrackers and other fireworks devices are flammable or combustible and/or generate pressure through decomposition, heat or other means.

2. Firecrackers and other fireworks devices may cause substantial personal injury or substantial illnesses during or as a proximate result of any customary or reasonably foreseeable handling or use.

3. Firecrackers and fireworks devices are "hazardous substances" pursuant to the provisions of section 2(f)(1) of the FHSA.

4. Firecrackers containing pyrotechnic composition in excess of 50 milligrams (.772 grains) when intended, or packaged in a form suitable for use in the household present a hazard of such a degree and nature that notwithstanding any cautionary labeling the public health and safety can only be assured by

prohibiting the devices from the channels of interstate commerce.

5. Firecrackers containing pyrotechnic composition of 50 milligrams (.772 grains) or less when intended, or packaged in a form suitable for use in the household can be adequately labeled to protect the public health and safety and do not present a hazard of a nature and degree which would require that they be banned from the channels of interstate commerce.

6. Fireworks devices other than firecrackers (as specified in § 1500.17(a)(9) of the order herein) failing to meet the safety requirements specified in section 1507 of this order, when intended or packaged in a form suitable for use in the household, involve a hazard of such a degree and nature that notwithstanding any cautionary labeling the public health and safety can be assured only by prohibiting such articles from the channels of interstate commerce.

7. The labeling requirements (as specified in § 1500.19(b) of the order herein) are reasonable and are necessary in the interests of the public health and safety.

8. The provisions of section 1507 of the order herein are reasonable and are sufficiently clear, and precise to be understood and enforced.

9. The Consumer Product Safety Commission has no jurisdiction to issue regulations for firecrackers and fireworks devices under the Federal Hazardous Substances Act, without first providing public notice in accordance with the applicable statutory and regulatory requirements.

10. The public health and safety requires that the regulations become effective at the earliest reasonable date. [41 F.R. at 9523-9524.]

Appendix C

NOT TO BE PUBLISHED—SEE LOCAL RULE 8 (f) UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 76-1495 September Term, 1977

NATIONAL SOCIETY FOR THE PREVENTION
OF BLINDNESS, INC., *et al.*, Petitioners

v.

CONSUMER PRODUCT SAFETY COMMISSION,
Respondent

OKLAHOMA PYROTECHNICS ASSOCIATION, *et al.*,
Intervenors

No. 76-1723

OKLAHOMA PYROTECHNICS ASSOCIATION,
Petitioner

v.

CONSUMER PRODUCT SAFETY COMMISSION,
Respondent

No. 76-1788

MIKE'S FIREWORKS & TOYS, INC., Petitioner

v.

CONSUMER PRODUCT SAFETY COMMISSION,
Respondent

AMERICAN PYROTECHNICS ASSOCIATION,
Intervenor

App. 14

Petitions for Review of an Order of the Consumer Product
Safety Commission.

Before: WRIGHT and MacKINNON, Circuit Judges, and
MARKEY,* *Chief Judge*, United States Court of Customs and
Patent Appeals.

JUDGMENT

These causes came on to be heard on petitions for review of a final order of the Consumer Product Safety Commission dated June 8, 1976, 41 Fed. Reg. 22931. After the hearing this court, by order of June 23, 1977, remanded the cases to the Commission for further proceedings, the court having found the voting procedure by which the final order was issued to be in violation of 21 U.S.C. § 371(e)(3) (1970), and that the Commission issued Finding of Fact No. 12 in support thereof without explaining why it rejected the contrary finding of the Presiding Officer.

On remand, after appropriate proceedings, the Commission amended its order of June 8, 1976 to eliminate the deficiencies found by the court in its order of June 23, 1977. The court now finds that the Commission's order, as amended by its Confirming Order and Supplementary Findings published on July 7, 1977, 42 Fed. Reg. 34873-34874, is in compliance with the procedure required by statute and is based on findings supported by substantial evidence.

*Sitting by designation pursuant to 28 U.S.C. § 293(a) (1970).

App. 15

76-1495—Nat'l Soc. for Prevention of Blindness v. CPSC
76-1723—Oklahoma Pyrotechnics Ass'n v. CPSC
76-1788—Mike's Fireworks & Toys, Inc. v. CPSC

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the petitions for review in these causes are hereby denied.

Per Curiam

For the Court

George A. Fisher
Clerk

Chief Judge MARKEY dissents from the foregoing judgment.

Appendix D

UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 76-1495

September Term, 1977

National Society for the Prevention
of Blindness, Inc., and American Public
Health Association,

Petitioners

v.

Consumer Product Safety Commission,

Respondent

Oklahoma Pyrotechnics Association, et al,

Intervenors

and consolidated case Nos. 76-1723 and 76-1788

BEFORE: Wright and MacKinnon, Circuit Judges; Markey*,
Chief Judge, U.S. Court of Customs and Patent
Appeals.

ORDER

Upon consideration of the motion of intervenor State of Hawaii for leave to file a motion for reconsideration, time having expired, and a motion for leave to file a petition for rehearing, time having expired, and it appearing that intervenor's motion for reconsideration and its petition for rehearing have been lodged in the Clerk's Office, it is

*Sitting by designation pursuant to 28 U.S.C. § 293(a).

ORDERED by the Court that intervenor's motions are granted and the Clerk is directed to file intervenor's motion for reconsideration and intervenor's petition for rehearing and to enter same on the docket, and it is

FURTHER ORDERED by the Court that intervenor's motion for reconsideration is denied, and it is

FURTHER ORDERED by the Court that intervenor's petition for rehearing is denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

Chief Judge Markey would grant intervenor's motion for reconsideration and petition for rehearing.